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No. 349

In the Supreme Court of the United States

OCTOBER TERM, 1960

WEYERHAEUSER COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 1a-20a) is reported at 276 F. 2d 865. The Board's decision and direction of election in the representation case (B.A. 91-94),[1] are unreported. Its decision and order in the unfair labor practice proceeding (B.A. 11-23) are reported at 124 NLRB No. 9.

JURISDICTION

The opinion of the Court of Appeals was issued on April 6, 1960 (Pet. 1a), and the same day a judgment was entered implementing that opinion (Appendix, p.

[1] "B.A." references are to the Board's Appendix filed in the Court of Appeals.

11, *infra*). A petition for rehearing was denied on May 4, 1960 (Pet. 21a), and a formal decree was entered on May 23, 1960 (Pet. 22a-23a). The petition for a writ of certiorari was filed on August 20, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition for certiorari was filed within the ninety-day period prescribed in 28 U.S.C. 2101(c).

2. Whether the Board's determination that petitioner's lithographic production employees constituted an appropriate bargaining unit was a reasonable exercise of its discretion under Section 9(b) of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix to the petition (Pet. 24a-26a).

STATEMENT

A. The Board Representation Proceeding

On February 28, 1958, the Amalgamated Lithographers of America, AFL-CIO, filed a representation petition with the Board, pursuant to Section 9(c) of the Act, requesting certification as the bargaining representative of all lithographic production employees at the petitioner's paper box plant in Middlebury, Indiana (B.A. 77-78). When the petition was filed, all employees in the plant were represented by United

Papermakers & Paperworkers, Local 1018, AFL-CIO, in a single plant-wide unit (B.A. 91; 81-82). At the hearing on the petition, the following evidence was presented concerning the appropriateness of a separate unit of lithographers:

Prior to 1956, the Company used only letter presses for printing (B.A. 28). In that year it installed lithographic offset presses, of the type generally used for commercial printing (B.A. 92; 28-31, 65-66, 75). To operate its new presses the Company hired the first five offset pressmen from the outside, without intra-plant "bidding" or requests for the new jobs among its existing employees, as had been its customary practice when other new jobs had been created (B.A. 50, 52-55, 58). Fourteen of the eighteen offset employees employed at the time of the hearing were hired directly from the outside for the offset operation (B.A. 56-57). The first and second pressmen came from commercial printing establishments (B.A. 47-49). Most of the other men had had previous lithographic experience (B.A. 50-58).

The original five offset pressmen were, after being hired, given sixty days of additional training in the operation of a lithographic press (B.A. 28-29, 46-47, 51). The plant library contained books on lithography which all offset personnel were urged to read (B.A. 48). In addition, the Company maintained an apprentice system to train new personnel for the offset press (B.A. 43, 52-53). The skills necessary to run this press and its method of operation were the same as for lithographic presses generally (B.A. 45-46, 65-66).

A special foreman supervised the 18 offset employees (B.A. 43-45). The time cards of these employees were kept separately (B.A. 49). Interchange of personnel

between the offset unit and other departments of the plant was rare, and the only exchange from the letter press to the offset press had been a temporary transfer at the apprentice level for a week or two because of a vacation or leave (B.A. 58-61). Promotions were made from within the offset group, and were not posted for plant-wide applications initially (B.A. 58). No employee from another department had ever exercised seniority to "bump" a person in the offset department during layoffs (B.A. 59). Moreover, offset pressmen had a separate wage schedule which was generally higher than that of other plant employees (B.A. 62-63, 79-80), and as a result of an agreement between the Paperworkers and the Company in May, 1957, the differential was increased still further (B.A. 62-63, 81).

The Lithographers Union, which sought to represent the lithographic unit, was founded in 1882, and had restricted its organizational activity to the representation of lithographic production employees (B.A. 71-74). It has union pay scales for differing lithographic skills, and conducts apprenticeship training programs for the lithographic industry (B.A. 66-68, 74-75).

On the foregoing facts, the Board found the employees in the offset department use the traditional and customary lithographic processes, and that the Lithographers Union was a traditional representative of employees performing such functions. Moreover, there was infrequent interchange of employees between the offset department and other departments in the plant, and no such integration of operations as would preclude separate representation of the offset employees. Accordingly, the Board concluded that the offset employees could constitute a separate appropriate unit, and directed an election in the offset department to

determine whether those employees desired separate representation or to remain in the existing plant-wide unit (B.A. 92). In the election, held on July 3, 1958, a majority of the offset employees manifested a desire for separate representation by voting for the Lithographers, and it was certified as their collective bargaining representative (B.A. 15-16; 95).

B. The Board Unfair Labor Practice Proceeding

Contending that a separate unit for lithographic employees was inappropriate, the Company refused to bargain with the Lithographers. Unfair labor practice charges were then filed with the Board, which, after hearing, sustained the validity of the certification previously issued and found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to honor it. The Board ordered the Company to cease and desist from its unfair labor practices, and to bargain with the Lithographers. (B.A. 11-12.)

C. The Decision of the Court of Appeals

The Court of Appeals enforced the Board's order, holding that the Board acted within the limits of its discretion under Section 9(b) of the Act in determining that the petitioner's lithographic employees constituted an appropriate bargaining unit. Summarizing its holding, the court stated (Pet. 10a):

> Having considered the record before us which discloses the factual setting of respondent's manufacturing operations, the long history of the Board's recognition of the cohesiveness of the bargaining interests of lithographers, the reasonable standards by which the Board exercised its "informed discretion," and our limited function in

reviewing the establishment of an appropriate bargaining unit, we cannot say that the Board's action was arbitrary or lacked substantial evidentiary support.

ARGUMENT

1. The petition for certiorari was untimely to obtain review of the issues settled by the judgment of the court below. 28 U.S.C. 2101(c) requires that the petition be filed within ninety days of the judgment or decree of the court of appeals. The court below entered its judgment on April 6, 1960 (Appendix p. 11, *infra*), the same day as it issued its opinion. The filing of a petition for rehearing deferred the start of the ninety-day period until May 4, 1960, when rehearing was denied (Pet. 21a). The petition for certiorari, however, was not filed until August 20, 1960, which is more than ninety days after May 4. Nor is a different conclusion required by the fact that a decree was entered on May 23 (Pet. 22a-23a). The decree did not revise legal rights and obligations, but was merely a ministerial formalization of the decision of April 20, which was confirmed by the denial of rehearing on May 4. Accordingly, it appears that the original judgment entered on April 6 was the final order understood by the court as its disposition of the issues before it, and that the denial of the motion for rehearing on May 4 fixed the time for the filing of the petition for a writ of certiorari. *United States* v. *Schaefer Brewing Co.*, 356 U.S. 227; *United States* v. *Hark*, 320 U.S. 531; *Commissioner* v. *Estate of Bedford*, 325 U.S. 283. Had the determination of the contents of the subsequent decree required the resolution of additional issues, it would seem that the time to review such action might be

held to run from the date of the decree, but that period would not apply to issues finally settled by the earlier judgment. Cf. *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

2. In any event, the Board's unit determination was manifestly within its powers under the Act and thus presents no issue warranting review by this Court. Section 9(b) of the Act vests the Board with wide discretion to determine whether the appropriate unit shall be "the employer unit, craft unit, plant unit, or subdivision thereof." In the light of the facts concerning the offset department and its employees—set forth in the Statement (pp. 3-4, *supra*) and analyzed in the opinion of the court below (Pet. 6a-8a)—ample basis existed for the Board's conclusion that a separate unit of lithographers was appropriate for bargaining purposes and that the employees in that unit should consequently be afforded an opportunity to determine whether they desired separate representation.[2]

There is no substance to the petitioner's contention (Pet. 6-14) that the Board failed adequately to articulate the grounds for its determination. A fair reading of the Board's decision (B.A. 92) shows, as the court below had no difficulty in recognizing, that it rests on the ample record facts just mentioned—namely, that the employees in the offset department were utilizing the traditional skills of lithographers, the craft status of which the Board had frequently recognized in past

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[2] *See May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 380; *National Labor Relations Board* v. *Morgantown Full Fashioned Hosiery Co.*, 241 F. 2d 913 (C.A. 4); *Harris Langenberg Hat Co.* v. *National Labor Relations Board*, 216 F. 2d 146, 147-148 (C.A. 8); *National Labor Relations Board* v. *Stanolind Oil & Gas Co.*, 208 F. 2d 239, 242 (C.A. 10).

cases (see Pet. 8a); that the union seeking to represent the offset employees was a traditional representative of lithographic employees; that there was little interchange of employees between the offset department and the rest of the plant; and that the plant was not so highly integrated as to render a separate craft unit inappropriate.

Nor is the petitioner aided by its effort (Pet. 7-10, 15-17) to interject the Board's *American Potash* decision, 107 NLRB 1418, into this case. In *American Potash* the Board declared that, except in the four industries where it had already been applied, it would no longer adhere to the principle[3] of declining to permit a craft unit to be severed from a larger unit where the operation was highly integrated and there had been a prior history of bargaining on an industrial basis; instead, it would permit severance even where those factors existed, if the group sought to be severed was a true craft group or its equivalent[4] and the union seeking to represent it separately was a traditional representative of employees exercising those skills. In *National Labor Relations Board* v. *Pittsburgh Plate Glass Co.*, 270 F. 2d 167, certiorari denied, 361 U.S.

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[3] Enunciated in *National Tube Co.*, 76 NLRB 1199.

[4] Contrary to the petitioner's assertion (Pet. 7-8), the Board, although primarily concerned with a group of employees exercising true craft skills, did not confine its decision in *American Potash* to those kinds of employees. It went on to add, after the passage quoted by the petitioner, that: "[W]e also recognize that the equities of employees in certain other minority groups, though lacking the hallmark of craft skill, may also require that they be treated as severable units. Many employers have functionally distinct departments containing employees identified with traditional trades or occupations distinct from that of other employees and who have common special interest in collective bargaining for that reason" (107 NLRB at 1424).

943, the Fourth Circuit held that the *American Potash* criteria were arbitrary, as applied to the plate glass industry, in ignoring the highly integrated nature of operations in that industry and its long history of bargaining on an industrial basis. However, as the court below properly noted (Pet. 8a-9a), it is not necessary in this case to pass on the validity of the *American Potash* criteria, or the correctness of the Fourth Circuit's rejection thereof in *Pittsburgh Plate Glass*. For both of those cases "involved industries *found to be integrated* and set applicable standards for severing a craft unit within such industries . . . . Here, the key finding of the Board, for which there is substantial support, *supra*, is that [the Company's] plant is *not* integrated" (Pet. 9a). In other words, even if the Board may not establish a craft unit merely on the basis that the group involved exercises distinctive skills and is sought to be represented by a union specializing in the problems of that group, where there are other relevant factors like integration of operations to consider, it does not follow that the former factors are an insufficient basis for a craft unit where, as here, no other relevant factors are present. See *National Labor Relations Board* v. *Libby-Owens Ford*, 241 F. 2d 831 (C.A. 4), and cases cited n. 2, *supra*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 1960.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO 10, ILLINOIS

Wednesday, April 6, 1960

BEFORE

HON. JOHN S. HASTINGS, *Chief Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. LATHAM CASTLE, *Circuit Judge*

No. 12793

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,
v.
WEYERHAEUSER COMPANY, a Corporation, as successor to the Act Folding Box Corporation, *Respondent*.

Petition for Enforcement of an Order of the National Labor Relations Board

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order entered July 10, 1959, respondent's answer to said petition, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition of the National Labor Relations Board for a decree enforcing its order be granted, in accordance with the opinion of this Court filed this day.

A True Copy:
Teste:
s/ KENNETH J. CARRICK
Clerk of the United States Court of Appeals for the Seventh Circuit.

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